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OCTOBER TERM, 1967

No. 1127

ATLANTIC INSURANCE COMPANY, COMMERCIAL INSURANCE COMPANY, COMMERCIAL STANDARD INSURANCE COMPANY, EMPLOYERS CASUALTY COMPANY, GENERAL INSURANCE CORPORATION, GULF INSURANCE COMPANY, HOUSTON FIRE AND CASUALTY INSURANCE COMPANY, INTERNATIONAL SERVICE INSURANCE COMPANY, MARATHON INSURANCE COMPANY, NATIONAL STANDARD INSURANCE COMPANY, REPUBLIC INSURANCE COMPANY, SECURITY NATIONAL INSURANCE COMPANY, SOUTHERN INSURANCE COMPANY, SUPERIOR INSURANCE COMPANY, TRANSPORT INSURANCE COMPANY, TRINITY UNIVERSAL INSURANCE COMPANY, UNITED SERVICES AUTOMOBILE ASSOCIATION, VANGUARD INSURANCE COMPANY,

*Appellants,*

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

*Appellee.*

**On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Four.**

## JURISDICTIONAL STATEMENT

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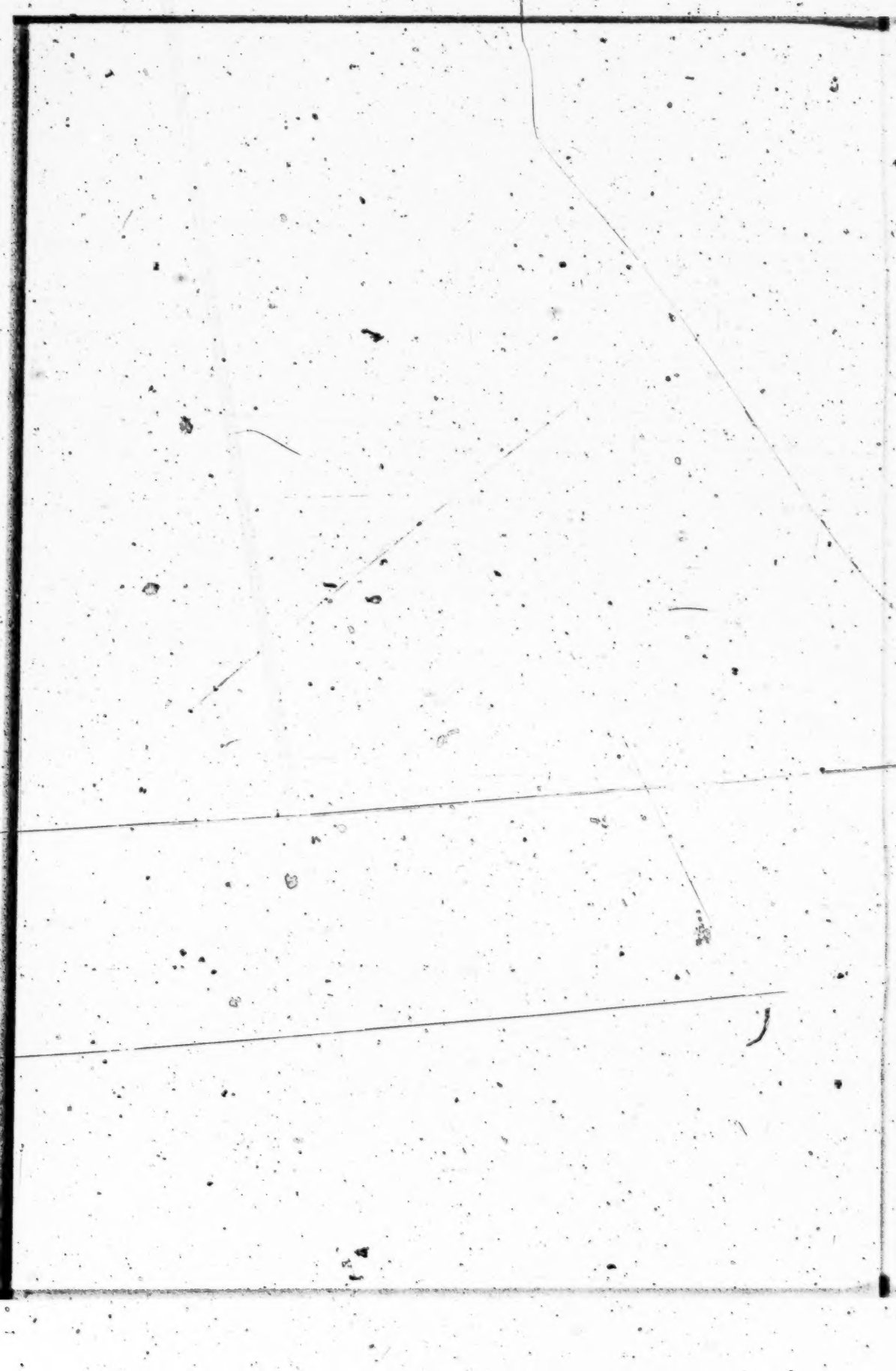

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*Appellants,*

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

*Appellee.*

**On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Four**

## JURISDICTIONAL STATEMENT

Appellamts appeal from that portion of the judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, upholding California

Insurance Code §§685-685.4 against the contention that the said statute violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and violates the commerce clause of the United States Constitution. This judgment affirms the judgment of the Superior Court of the City and County of San Francisco in Action No. 518994. The California Supreme Court denied our petition for hearing. Said judgment of the Court of Appeal of the State of California was entered on 30 November 1967, the date the California Supreme Court denied a hearing; said judgment was filed in the Court of Appeal on 5 October 1967.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

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## OPINION BELOW

The opinion of the Court of Appeal is reported in 255 Adv. Cal. App. 8, 62 Cal. Rptr. 784, ____ Pac. 2d ____. It is attached hereto as Appendix A. The findings of fact, conclusions of law, and judgment of the Superior Court of the City and County of San Francisco in Action No. 518994 (affirmed by the Court of Appeal) are not reported and are attached hereto as Appendix B.

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## JURISDICTION

This suit was brought by eighteen Texas fire and casualty insurers under California Revenue and Taxation Code §13102 for recovery of retaliatory taxes imposed by the State of California under the authority of California

Insurance Code §§685-685.4 for the years 1959 and 1960. Recovery was sought on the ground that said sections are unconstitutional and void because in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and of the commerce clause of the United States Constitution. The judgment of the Court of Appeal of the State of California upholding said statute against the contention that it violated the United States Constitution in the particulars mentioned was entered on 30 November 1967, the date the California Supreme Court denied a hearing; (said judgment was filed in the Court of Appeal on 5 October 1967). Notice of Appeal was filed in the Court of Appeal on 19 January 1968. The jurisdiction of the Supreme Court to review this decision is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case: *Wheeling Steel Corp v Glander* (1949) 337 US 562; *Reserve Life Ins Co v Bowers* (1965) 380 US 258; *Hanover Fire Ins Co v Carr* (1926) 272 US 494; *Southern Railway Co v Greene* (1910) 216 US 400.

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## QUESTIONS PRESENTED

1. Whether some foreign (out of state) insurance companies, admitted unconditionally to a state, may subsequently be discriminated against, in comparison with domestic and other foreign insurers, by imposition of a retaliatory tax not imposed on domestic or all foreign insurers. That is to say: whether California may impose a retaliatory tax on some foreign insurers unconditionally admitted to transact insurance in California at a time

when no such tax statute existed; or whether imposition of such tax denies such foreign insurers equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

2. Whether a discriminatory retaliatory tax imposed only on some foreign insurance companies and not on domestic or all foreign insurance companies is a violation of the commerce clause of the United States Constitution.

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## STATUTES INVOLVED

California Insurance Code §§685, 685.1, 685.2, 685.3, and 685.4 (Stats 1959 Ch 2120 §1 pp. 4945-4946) are set forth in Appendix C hereto.

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## STATEMENT

Appellants are eighteen Texas fire and casualty insurers admitted to transact insurance in California and engaged in interstate commerce. Ten of the companies were admitted to California between 1945 and 1959, during which period California did not impose a retaliatory tax, and they obtained unequivocal licenses to do business in California, as distinguished from a year to year admission to the state. All appellants were admitted to California prior to passage of the 1959 retaliatory law.

Appellants paid $634,000 gross premiums tax to California for 1959 and $685,000 for 1960. The gross premiums tax was imposed on both domestic and foreign insurers uniformly. In addition, appellants paid California $460,000 retaliatory tax for 1959 (out of a total of

$717,000 in retaliatory taxes imposed on insurers from all states outside California doing business in California, or 64% of all retaliatory taxes imposed by California) and a comparable figure for 1960. California insurers and insurers of many other states did not pay California any retaliatory tax.

As to all appellants, the imposition of a retaliatory tax not imposed on domestic and all foreign insurers constituted a denial of equal protection in violation of the Fourteenth Amendment to the United States Constitution; and the retaliatory tax discriminated against certain foreign insurers and in favor of domestic and other foreign insurers and unreasonably burdened interstate commerce and constituted a violation of the commerce clause of the United States Constitution.

*How the Federal Questions Are Presented.* Appellants filed suit against appellee in the Superior Court of the City and County of San Francisco, Action No. 518994. The complaint alleged that the statute under which the tax was assessed is unconstitutional in that it violates the Fourteenth Amendment to the United States Constitution [Document No. 8 of Record on Appeal, at p. 101, lines 20-24]. Plaintiffs' and defendant's exhibit 1-A in the trial court, at p.33 lines 21-29 [Document No. 11 of Record on Appeal], states that appellants contend that California Insurance Code §§685 through 685.4 are unconstitutional because in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and the commerce clause of the United States Constitution. The trial court found as a conclusion of law (conclusion of law III) on which it based its judgment:

> "The retaliatory law, comprising sections 685-685.4, was and is valid . . . The said retaliatory law is neither in violation of Article I, §8, Clause 3, of the United States Constitution [commerce clause], nor of the equal protection nor due process clauses of the 14th Amendment to that Constitution. . ." [Appendix B p. xxiv]

Appellants raised these constitutional points in their briefs on appeal to the California Court of Appeal. The Court of Appeal, whose judgment is now before this Court, passed upon and rejected these points. It devoted more than seven pages of its twenty-four page opinion to the equal protection and commerce clause points [Appendix A, pp. xii-xviii]. The points were again raised by appellants in their petition for hearing in the California Supreme Court, at the top of p.3 [Document No. 5 of Record on Appeal, at p.43], but the California Supreme Court denied a hearing (without opinion).

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## THE QUESTIONS ARE SUBSTANTIAL

The questions presented herein are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for the reasons hereinafter stated.

In *Ozark Butane Co Inc v Oklahoma Liquefied Petroleum Gas Board, et al* (1964) 369 US 885, in a case involving many of the same issues as the case at bar, this Court stated: "Probable jurisdiction is noted and the case is placed on the summary calendar." The decision below in which a three-judge United States District Court for the Western District of Oklahoma upheld retaliatory legislation is reported at 235 Fed Supp 406 (DC WD Okla

1964). On 2 March 1965 the appeal was dismissed by stipulation under Rule 60. (380 US 928.) In checking with counsel for appellant we are informed that appellant was bought out while the appeal was pending which made the appeal moot. This case, however, indicates that this Court felt in 1964 that the issues in this case merited review.

In *Fire Association of Philadelphia v New York* (1886) 119 US 110 this Court upheld a retaliatory tax, but only because the foreign insurer had only a one year license *subject to annual renewal*; the Court stated that as a condition of renewal a discriminatory tax could be imposed. In *Prudential Ins Co v Hobbs* (1946) 328 US 823 [same case below, 160 Kan 300, 161 Pac.2d 726 (1934)] a retaliatory tax was upheld, but again the tax law had been in effect since 1871 and it was being applied to foreign companies seeking admission *after* that date. These cases follow the rule that a state may exclude a foreign corporation entirely or it may admit it subject to conditions which may be discriminatory. Two other cases supporting the same principle but involving the gross premiums tax rather than a retaliatory tax are *Lincoln National Life Ins Co v Read* (1945) 325 US 673 and *Prudential Ins Co v Benjamin* (1946) 328 US 408.

At the same time, however, this Court has consistently held that once a foreign corporation has been admitted to a state unconditionally, it may not later be discriminated against by a higher rate of taxation or the imposition of additional burdens not imposed on domestic corporations. The leading cases for this proposition are *Hanover Fire Ins Co v Carr* (1926) 272 US 494, *Southern Railway Company v Greene* (1910) 216 US 400, and more

recently *Wheeling Steel Corp v Glander* (1949) 337 US 562 and *Reserve Life Ins Co v Bowers* (1965) 380 US 258. Compare *State Board of Ins v Todd Shipyards* (1962) 370 US 451. See also *Connecticut General Life Ins Co v Johnson* (1938) 303 US 77, where an unsuccessful attempt was made to impose a tax against a foreign insurer which had been doing business in the state for many years. The decision below in the case at bar is in conflict with *Hanover* and the other cases cited in this paragraph.

The California Court of Appeal in its opinion concedes that appellants obtained certificates of authority to transact insurance "for an indefinite period" [Appendix A, p. xvi]. The opinion states:

> *"Unlike insurers who must obtain an annual license to conduct business, appellants appear to have obtained 'unequivocal' licenses to do business.* The fact that the California certificates of authority could be revoked for failure to pay taxes or to otherwise comply with the law (Ins. Code §701) does not alter that position. Hanover Fire Ins. Co. v. Harding, supra, 272 U.S. 494, is said to stand for the proposition that once a foreign corporation has been unconditionally admitted to do business in a state it must be granted equal protection. (272 U.S. at p. 514 [71 L.Ed. at p. 382].) *We conclude that appellants here are entitled to equal protection. . . .*" (emphasis added) [Appendix A, p. xvi]

The California Court of Appeal then notes that ten of appellants were admitted to the state at a time when there was no retaliatory law. (As noted above, all appellants were admitted prior to the passage of the law in question.) The court concludes, nevertheless, that equal protection has not been denied appellants.

Retaliatory laws are a matter of great public interest and importance since they are discriminatory in nature, and because most states have such laws. They place a substantial burden on interstate commerce and are in the nature of tariffs. Professor Patterson in his classic work "The Insurance Commissioner in the United States" (1927) at p. 107 states:

> "It may be confidently asserted that they [retaliatory statutes] were passed at the instigation of domestic insurers, for the purpose of erecting a sort of tariff wall around the state; and that they [retaliatory statutes] did not benefit the insuring public, however much they may have increased the state's revenues."

Appellants here, however, are not making a general attack against retaliatory laws as such but only against such laws when and to the extent that they discriminate against foreign companies which have already been unconditionally admitted to a state prior to passage of the law.

Dated:
16 February 1968.

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**(Appendices A, B and C Follow)**